

SURFACE TRANSPORTATION BOARD

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB-33 (Sub-No. 70)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT—WALLACE BRANCH, ID

Decided: June 22, 2000

In this decision, the Board completes its analysis of the potential environmental consequences of salvage (i.e., removal of the tracks, ties, and rail bed) of the 71.5-mile Wallace Branch rail line in Benewah, Kootenai and Shoshone Counties, Idaho.¹ We remove the six environmental conditions imposed in 1992 by our predecessor agency, the Interstate Commerce Commission (ICC),² and impose additional environmental mitigation measures, including a modified historic preservation condition. We give our final approval for the Union Pacific Railroad Company (UP) to salvage this line, subject to the four environmental mitigation conditions set forth at the end of this decision. In addition, we issue a Certificate of Interim Trail Use (CITU) permitting interim trail use/rail banking on this right-of-way because the requirements of section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and our regulations at 49 CFR 1152.29, have been met.

¹ The Wallace Branch no longer has stations because rail service has already been discontinued. The 7.9-mile section of right-of-way within the Bunker Hill Superfund Site (BHSS) was addressed in the BHSS Record of Decision (EPA 1992) and is not part of the salvage proposal before the Board. Section 121(e)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9621(e)(1), relieves UP of the requirement to obtain Board approval to remove track within the BHSS if it is done in connection with remediation actions carried out in compliance with CERCLA. Pursuant to section 121(e) of CERCLA, UP removed track within the BHSS in connection with remediation actions carried out in compliance with CERCLA, but states that it has not, by undertaking such remediation, or by any other action, abandoned any portion of the Wallace Branch, including the portion within the BHSS.

² The ICC was abolished by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA). ICCTA transferred certain functions and proceedings, including the functions at issue here, to the Board on January 1, 1996. Section 204(c) of ICCTA provides that where, as here, a court remands a suit against the ICC that was pending on the effective date of that legislation and involves functions retained by ICCTA, subsequent proceedings related to the case shall proceed under the applicable law and regulations in effect at the time of the subsequent proceedings.

BACKGROUND³

The Original ICC Decision and Court Remand.

In August 1991, UP applied to the ICC for authority to abandon its Wallace Branch rail line (the Line).⁴ The ICC granted UP's application subject to various conditions.⁵ The ICC allowed UP to discontinue service over the Line at once, but provided that UP could not abandon the Line fully (i.e., salvage and permanently remove the Line from the rail network) until the environmental impact of the proposed abandonment was resolved.⁶ The ICC imposed six environmental mitigation conditions, developed by the predecessor to our Section of Environmental Analysis (SEA),⁷ requiring consultation, and possible permitting and environmental review by various state and Federal environmental agencies with the appropriate jurisdiction and expertise, prior to any salvage and reuse of the track.⁸ The ICC found that, with

³ This abandonment proceeding has a lengthy history, and the record is voluminous. We will recount this history here only as necessary to frame the relevant issues.

⁴ The Line was constructed in the late 1800s to serve the silver mining industry located in an area known as Silver Valley, in Idaho, and remained active until rail service was discontinued in 1992. The Line extends from a point near Plummer to a point near Wallace, and then to a point near Mullan, in Benewah, Kootenai, and Shoshone Counties. It runs in an east-to-west direction across northern Idaho, traversing the BHSS, the Heyburn State Park, the Coeur d'Alene Indian Reservation, and the Coeur d'Alene Basin.

⁵ See Union Pacific R.R. Co.--Aband.--Wallace Branch, ID, 9 I.C.C.2d 325 (1992), 9 I.C.C.2d 377 (1992), 9 I.C.C.2d 496 (1993).

⁶ During the course of the proceeding, the entire right-of-way had been found to be contaminated with heavy metal concentrates as a result of drainage from rail cars transporting mine materials over the Line. Contamination had also resulted from mine wastes used as ballast during the original construction and subsequent maintenance of the Line.

⁷ SEA had issued an Environmental Assessment, in September 1991, for public review and comment.

⁸ Specifically, these conditions, set out at 9 I.C.C. at 339, were:

1. UP shall not salvage any railroad infrastructure, including the rail and ties, along the entire right-of-way until it has consulted with the Idaho Department of Environmental Quality and the U.S. Environmental Protection Agency. This

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consultation will ensure that if and when salvage activity ultimately takes place, it will be in compliance with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601, et seq., the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901, et seq. and/or other applicable laws and regulations.

2. Pursuant to the U.S. Fish and Wildlife Service (USFWS) request, UP, prior to any salvage activity, shall determine, using National Wetland Inventory Maps, if wetlands are located along the right-of-way. If wetlands are located along the right-of-way, UP shall consult with USFWS prior to any disturbance of the right-of-way and comply with any applicable requirement of the U.S. Fish and Wildlife Coordination Act, 16 U.S.C. § 661.

3. UP shall not undertake any salvage activities on the Wallace Branch until compliance with § 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1531, has been completed. As a part of the § 7 compliance process, UP shall retain an independent biological consultant, to work under the supervision of the Section of Environmental Analysis (SEA) and in cooperation with USFWS to prepare a biological assessment.

4. A Water Pollution Control Act permit under 33 U.S.C. § 1251, et seq., may be required prior to salvage of the portion of the Wallace Branch where it crosses the Coeur d'Alene River. Prior to any salvage activities, UP shall contact the Idaho Department of Health and Welfare, Division of Environmental Quality, to determine if such a permit is required and take the necessary steps to secure a permit.

5. The U.S. Army Corps of Engineers (CORPS) has expressed concern regarding impacts to wetlands and water quality if UP salvages the right-of-way. In addition, the CORPS has indicated that materials in the area through which the track passes should be tested prior to any attempt to remove it. Accordingly, UP shall consult with the CORPS prior to undertaking any salvage activities to determine what appropriate mitigation may be required.

6. UP shall retain its interest in and take no steps to alter the historic integrity of all structures, including the line itself, that are 50 years old or older until completion of the § 106 process of the National Historic Preservation Act,

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these protective conditions, UP's abandonment proposal would not significantly affect the quality of the human environment. The ICC, therefore, found that preparation of an Environmental Impact Statement (EIS) was unnecessary.

In State of Idaho v. ICC, 35 F.3d 585 (D.C. Cir. 1994) (State of Idaho), the court affirmed the ICC's decision to permit UP's immediate discontinuance of rail operations,⁹ but remanded the ICC's conditional authorization of salvage. The court did not find fault with the substance of the ICC's six environmental conditions, but expressed concern that they did not require any further assessment by the ICC prior to salvage. The court concluded that the ICC had attempted to delegate away too much of its responsibility to look at the potential environmental impacts of salvage activity before authorizing such activity.

On remand, the ICC reopened this proceeding, in December 1994, to complete its analysis of the potential environmental impacts of salvage. The ICC made clear that its conditional grant of abandonment authority would not be final (and that UP could not conduct salvage activities on the portion of the Line outside the BHSS) until UP submitted the necessary environmental documentation to complete the environmental compliance process and received final approval from the agency to salvage that portion of the Line.

The Reopened Proceeding.

Since the reopening of this proceeding some 5 years ago, UP has worked with the Environmental Protection Agency (EPA), the United States Department of Justice, the Federal trustees for natural resources in the Coeur d'Alene Basin (the Department of Interior, including the U.S. Fish and Wildlife Service (USFWS), the Bureau of Land Management, and the Department of Agriculture-Forest Service), the State of Idaho (the State), and the Coeur d'Alene Tribe (the Tribe) (collectively the Governments)¹⁰ to resolve various environmental and natural resource issues. To document these activities, on June 18, 1999, UP submitted to the Board the information it considered necessary to complete the environmental compliance process.

Specifically, UP provided an extensive Engineering Evaluation/Cost Analysis (EE/CA), that had been issued and approved by EPA, as well as other technical studies that discuss the

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16 U.S.C. § 470f.

⁹ Thus, that part of this case is administratively final and no longer at issue.

¹⁰ References to the State include both the State of Idaho and the Idaho Department of Environmental Quality (IDEQ). References to "the Governments" will not always include each of the entities listed above.

historical activities in the Coeur d'Alene River Basin and their effects on the ecosystems, describe the sources of contamination found at various locations along the right-of-way, and evaluate various response action alternatives for the mine waste contamination.

UP also submitted a detailed Track Salvage Work Plan (the Salvage Plan), developed in consultation with, and with the approval of EPA and IDEQ, which describes various environmental controls that would be imposed on UP during the removal of the rails, ties, and other track materials from the right-of-way. The Salvage Plan includes procedures to protect adjoining areas (including wetlands) from the effects of salvage and to ensure that materials that are salvaged for reuse or recycling are decontaminated and that materials that cannot be recycled or reused are properly eliminated.

UP's submission also included National Wetland Inventory Maps and other information identifying wetlands adjacent to the right-of-way. UP's material indicates that, if the actions in the EE/CA and the Salvage Plan are implemented, impacts to water quality and the wetlands located along the right-of-way would be addressed and mitigated. In addition, UP submitted a Biological Assessment (BA), prepared for and approved by the USFWS, which indicates that, if the mitigation in it is implemented, the salvage project would not likely result in an adverse effect on federally listed and proposed threatened or endangered species.

Furthermore, UP's filings included a letter from the Governments, dated May 20, 1999, stating that their representatives have consulted and negotiated with UP concerning the appropriate actions necessary to satisfy the ICC's six environmental conditions and comply with CERCLA and other applicable environmental laws and regulations. The Governments stated that they believe that UP has complied with the ICC's environmental conditions, and that they fully support UP's salvage of the Wallace Branch in accordance with the procedures they have worked out with the railroad. UP also provided other concurrence letters from agencies with specialized expertise (including EPA, USFWS, and the United States Army Corps of Engineers) and a cultural resources report and letter from the Idaho State Historical Society (Idaho SHPO) describing both the historical context of the Line and the buildings and bridges over 50 years old that have historical significance.

At our direction, UP made copies of these documents available for public review and comment in May and June 1999 (prior to filing these materials with the Board) at several locations near the Line. UP indicates that no comments, other than requests for copies, were received.

On August 12, 1999, we served and published in the Federal Register a notice that UP had filed its environmental compliance documents. That notice informed all interested persons of how the Board and SEA planned to proceed in this matter. The notice provided for a comment period, but no comments were filed.

On October 7, 1999, EPA issued an Action Memorandum concluding the EE/CA process. The Action Memorandum, which was submitted to SEA, provides further information on the sources of contamination within the right-of-way, the threats of contamination to the public health and welfare, the experience gained from the salvage actions that have been undertaken on the portion of the line within the BHSS, the determination of appropriate response actions, and the estimated cost of those actions (expected to be in excess of \$25 million). The Action Memorandum reflects EPA's concern that, should the proposed removal actions be delayed or not taken, hazardous materials will remain as potential human health and environmental threats along the right-of-way and the Coeur d'Alene River. Furthermore, it makes clear that EPA, the State of Idaho, and the Tribe will oversee UP's removal actions to ensure that the actions to be conducted are protective of human health and the environment, and that the actions comply with a Consent Decree finalizing the terms of the Governments' agreement with UP, which was lodged with the district court in Idaho on December 23, 1999.¹¹

THE SUPPLEMENTAL ENVIRONMENTAL ASSESSMENT

SEA issued a thorough Draft Supplemental Environmental Assessment (Draft Supplemental EA) on January 7, 2000, which concluded that the material submitted by UP satisfied all of the original ICC-imposed environmental conditions except for Condition No. 6, dealing with historic preservation. SEA recommended modification of this condition. SEA also recommended additional environmental mitigation conditions. SEA concluded that if UP complies with the EE/CA, the Salvage Plan, and the BA, and if the additional mitigation it recommended is imposed and implemented, UP's proposal to salvage the Wallace Branch would not have significant adverse environmental impacts. SEA initiated a 45-day comment period

¹¹ As detailed in SEA's Supplemental Environmental Assessment, which is discussed below, the Consent Decree was lodged with the United States District Court of Idaho in United States & State of Idaho v. UP, No. CV 99-0606-N-EJL, and Coeur d'Alene Tribe v. UP, No. CV 91-0342-N-EJL. The Consent Decree, if it is approved by the Court, will obligate UP to perform response actions, including the repair of flood damage and salvage activities, in compliance with all applicable environmental laws and under oversight by the United States, the State, and the Tribe. Under the Consent Decree, UP also has agreed to transfer the right-of-way to the Tribe and the State for interim trail use under the Trails Act. UP will remain liable for cleanup if information previously unknown to the Governments is later received indicating that the response actions selected through the EE/CA process will not protect human health and the environment. UP also will be responsible into perpetuity for the operation and maintenance of the various barriers that will be used in implementing the response actions. Additional cleanup activities may also be performed or funded by other potentially liable parties. The Consent Decree is an independent agreement negotiated by UP and the Governments, with input from the public.

(from January 7, 2000, to February 22, 2000), and sought comments on all aspects of the Draft Supplemental EA, as well as on the Board's environmental review process on reopening.

Comments were received from EPA, the Tribe, the State of Idaho (the Division of Environmental Quality and the Department of Parks and Recreation), UP, the Idaho SHPO, Citizens Against Rails-to-Trails (CART),¹² Jim and Janice Walden, Angelo and Joyce Bissell, L. Rogers and Antonia M. Hardy, and Gordon Scott.¹³ As discussed in detail in SEA's Final Supplemental Environmental Assessment (Final Supplemental EA), the comments from EPA, the State, the Tribe, and UP all support SEA's analytical approach and conclusions, other than to request that the recommended historic preservation condition in the Draft Supplemental EA be modified (which SEA has done) and to suggest additions or corrections to factual information in the Draft Supplemental EA. These commenters urge the Board promptly to grant UP final salvage authority and to issue a CITU that would permit interim trail use on the right-of-way. The Idaho SHPO and the Waldens express concerns about the need to ensure completion of the historic review process, particularly for the Chatcolet swing bridge.¹⁴ The comments from CART, the Bissells, and the Hardys argue that SEA's analytical approach does not meet the

¹² On March 30, 2000, UP submitted a response to CART's comments.

¹³ SEA responded to all the comments but Mr. Scott's in the Final Supplemental Environmental Assessment, and there is no need to repeat SEA's analysis in this decision. However, because the letter-comment submitted by Mr. Scott, an adjacent landowner, was inadvertently omitted in SEA's discussion, we will address that comment here. Mr. Scott states that he favors the "clean up" process and trail use, but is concerned about possible trespassing on his property from trail users. Additionally, he notes that his property may be of use in the cleanup process.

In response, we note that the Board has no authority to address concerns such as trespassing. As we have frequently stated, under the Trails Act the Board is given only a limited, ministerial role. See 16 U.S.C. 1247(d); Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990) (Goos). The Board is not authorized to regulate activities over the actual trail. Thus, landowners, communities, and other members of the public must rely on other federal, state, or local laws for resolution of any issues relating to trail development and trail maintenance.

¹⁴ As detailed in the Final Supplemental EA (at pp. 30-33), following the receipt of these comments, SEA consulted with the Idaho SHPO and UP to develop a final recommended historic preservation condition. We agree with SEA that this condition meets the Idaho SHPO's concerns as well as the concerns of the other commenters that addressed historic preservation.

concerns raised by the court in State of Idaho and oppose plans to convert the Wallace Branch rail line into a recreational trail under the Trails Act.¹⁵

On April 14, 2000, to complete its environmental review process, SEA issued the Final Supplemental EA assessing (1) whether the ICC's six environmental conditions are met and (2) whether the environmental concerns regarding salvage activity raised during the course of this proceeding have now been appropriately addressed and resolved. In conducting its analysis, SEA independently assessed all of the EE/CA and Salvage Plan materials, as well as the BA, maps showing the location of wetlands, and other data, analysis, and correspondence prepared by EPA and other agencies with specialized expertise over the types of environmental issues of concern in this proceeding. SEA also addressed the comments that it received on the Draft Supplemental EA.¹⁶

As explained in the Supplemental EA, SEA determined that the potential environmental effects of salvage now have been thoroughly assessed, and that the actions UP would be required to take under the EE/CA, the Salvage Plan and the BA appear to be reasonable and appropriate mitigation to address any potential significant adverse impacts that would result from track salvage of the Line. Moreover, SEA concluded that the available environmental information makes clear that the "no-action" alternative to UP's proposed salvage activity -- leaving the track structure in place -- would harm the environment and is not a permanent solution. As SEA explained, removal of the track structure would permit UP to undertake actions that would reduce or eliminate environmental concerns associated with the rail bed in its present state. On the other hand, without salvage, the potential for exposure to mine wastes would continue because these actions could not be implemented with the track in place. Also, deterioration of the track structure as a result of flooding and other natural forces would continue and with it the potential for increased contamination adjacent to the right-of-way. Thus, the denial of UP's requested salvage activity on this line likely would be worse, from an environmental standpoint, than authorizing UP's proposed salvage activity.

¹⁵ As discussed in the Final Supplemental EA, the Bissells question whether the proposed cleanup will be adequate and whether the right-of-way is truly a candidate for rail banking, while the Hardys question the description of a portion of the right-of-way abutting Lake Coeur d'Alene and raise concerns about the effect of potential interim trail use on their property rights. The Hardys also submitted a comment via fax dated April 18, 2000. This late-filed comment continues to voice opposition to any trail use for the Line.

¹⁶ As noted above, to ensure adequate opportunity for public input, UP made copies of the documents it submitted to us on June 18, 1999, available for public review and comment at several locations near the Line in May and June 1999, prior to UP's filing with the Board. SEA also attached appropriate portions of the materials to the Draft Supplemental EA.

Further, SEA noted that the Salvage Plan identifies various environmental controls that would be imposed on UP during the removal of the rails, ties, and other track materials from the right-of-way, including procedures to protect adjoining areas from the effects of salvage, and ensures that materials that are salvaged for reuse and/or recycling are decontaminated and that materials that cannot be recycled or reused are properly disposed of. SEA pointed out that the EE/CA and Salvage Plan materials, and the comments to the Draft Supplemental EA, also indicate that there will be continuing oversight of UP's salvage activities and of UP's response actions to address contamination both on, and adjacent to, the right-of-way.¹⁷

Based on its evaluation of all the available information, SEA concluded that the material provided by UP is sufficient to satisfy all but one of the ICC's six environmental conditions.¹⁸ Furthermore, SEA concluded that, if UP complies with the EE/CA materials, the Salvage Plan, and the BA, and if the four additional environmental mitigation measures SEA recommends are imposed and implemented, UP's proposal to salvage the Line would not have significant adverse environmental impacts. Therefore, SEA determined that preparation of an EIS is not necessary.

DISCUSSION AND CONCLUSIONS

The National Environmental Policy Act (NEPA) requires that we take environmental considerations into account in our decisionmaking. In State of Idaho, the court found that the ICC's environmental analysis was not complete because the ICC did not have all the information needed to take a "hard look" at the environmental effects of salvage, and to weigh it against the economic benefits of permitting salvage, in the circumstances of this case. 35 F.3d at 595. The court did not find fault with the substance of the ICC's environmental conditions or disapprove of the ICC's practice of consulting with, and relying on, the technical expertise of appropriate agencies. Rather, the court's concern was that the ICC had delegated away too much of its authority because the conditions the ICC imposed did not require any further assessment by the ICC prior to salvage. We believe that, through SEA's independent review of the material submitted by UP, its preparation of the Supplemental EA, the input SEA received from commenters and agencies and others with specialized expertise, as well as our own thorough review and assessment of UP's compliance documents, all other submissions, and SEA's analysis, we have fully addressed the court's concerns.

¹⁷ The information SEA has received on the Consent Decree indicates that it, too, contemplates continued oversight.

¹⁸ As noted, the only condition that has not yet been satisfied is the ICC's Environmental Condition No. 6, involving historic preservation. In the Final Supplemental EA, SEA recommends that the Board substitute a modified historic preservation condition. SEA believes (and we agree) that this modified condition, which SEA developed in consultation with the Idaho SHPO and UP, will ensure completion of the historic review process.

We have carefully reviewed the Supplemental EA and, as discussed below, we concur in SEA's analysis and recommendations and will impose SEA's recommended environmental conditions. We agree with SEA that the potential environmental effects of salvage have been thoroughly explored and assessed, and that, if the actions that UP would be required to take under the EE/CA, the Salvage Plan, and the BA, are implemented, along with the additional mitigation SEA recommends in the Final Supplemental EA, UP's proposal to salvage the Line would not have significant adverse environmental impacts and preparation of a full EIS is not necessary.

The available environmental information makes clear that the "no-action" alternative to UP's proposed salvage activity — leaving the track structure in place — is not a permanent solution and likely would be worse from an environmental standpoint than authorizing it. As detailed in the Supplemental EA, removal of the track structure would permit UP to take actions that would significantly reduce or eliminate environmental concerns associated with the rail bed in its present state. Without salvage, however, the potential for exposure to mine wastes would continue because these actions could not be implemented with the track in place. Also, deterioration of the track structure as a result of flooding and other natural forces would continue, which would further contaminate the area adjacent to the right-of-way.

Contrary to the claims of some commenters, SEA appropriately used information from the documents submitted by UP, as well as the comments, concurrence letters and correspondence reflecting the views of the Governments, other agencies, and members of the general public, to determine whether the ICC's six environmental conditions are met and whether the environmental concerns regarding salvage activity raised in the course of this proceeding now have been appropriately addressed and resolved. NEPA does not preclude reliance on the pertinent analysis and views of other entities, and there is no need for SEA, in performing its environmental analysis, to redo or duplicate the work of agencies and others with specialized expertise.

Some commenters argued that, in addition to performing an environmental analysis of salvage, SEA should have considered the possibility that the property will be used as a trail under the Trails Act.¹⁹ However, as SEA explained, it is well settled that in conducting environmental review in abandonment cases, the Board's role is limited to the anticipated impacts of the

¹⁹ For example, CART claims that the environmental analysis of abandonment and salvage cannot be separated from the environmental implications of potential conversion of the right-of-way into a recreational trail because the response actions in the EE/CA materials and Consent Decree contemplate that interim trail use is possible on this right-of-way. CART further suggests that the right-of-way corridor cannot be used in this manner because of the alleged environmental hazards on and adjacent to the right-of-way corridor.

abandonment proposal before the agency, e.g., the likely diversion of traffic to other lines or transportation modes and the likely disruptive consequences of removing the track and related structures. Iowa Southern R. Co. -- Exemption -- Abandonment, 5 I.C.C.2d 496 (1989), aff'd, Goos. Given the Board's limited, ministerial role under the Trails Act, questions related to whether, and how, this right-of-way should be used as a trail are not matters for the Board's consideration. Id.; 16 U.S.C. 1247(d); 49 CFR 1152.29.

Under the statute and the Trails Act regulations, the Board has no involvement in the parties' negotiations. The Board does not analyze, approve, or set the terms of trail use agreements. The Board also is not authorized to regulate activities over the actual trail, and has no authority to deny a trail use request if the statute has been properly invoked and the railroad has consented to negotiate.²⁰ Because the Board's role under this and any other trail proposal is ministerial, the issuance of a CITU is not a federal action under NEPA requiring the preparation of an environmental analysis. See Goos. The possibility that the Line will be used for interim trail use/rail banking thus is not part of the Board's environmental review of UP's request for final authority to salvage the Line.

In any event, in this case the environmental implications of preparing the land for possible conversion to interim trail use have been thoroughly considered by EPA and others during the EE/CA and Consent Decree process. Moreover, those agencies will oversee UP's salvage and response action activities during the salvage process and possible conversion to interim trail use.

In short, we agree with SEA's analysis and recommendations on all of the relevant issues and adopt them as our own. We find that salvage operations on this Line can now go forward and that, if SEA's four recommended environmental mitigation conditions are imposed and implemented, track salvage of the Wallace Branch will not result in any significant adverse environmental impacts and will, in fact, result in beneficial environmental impacts. Accordingly, we give final approval to UP to salvage the Wallace Branch, subject to the four environmental conditions and the other terms and conditions set out below, and remove the ICC's environmental conditions.

²⁰ Under 16 U.S.C. 12471(d), when a trail sponsor has agreed to assume financial responsibility for the property and liability for use of a right-of-way as a trail, and has agreed to keep the right-of-way available for the possible reactivation of rail service, and the railroad has agreed to negotiate with the trail sponsor, we must impose a trail condition.

TRAIL USE

Trails Act Request.

On August 3, 1999, the State and the Tribe jointly requested issuance of a CITU under the Trails Act to enable them to acquire for interim trail use/rail banking the entire 71.5-mile Wallace Branch Line (including the portion of the line within the BHSS). The State and the Tribe submitted a joint statement of willingness to assume financial responsibility for the right-of-way and acknowledged that use of the right-of-way is subject to possible future reactivation for rail service in compliance with 49 CFR 1152.29. By letter filed August 9, 1999, UP states that it is willing to negotiate with the State and the Tribe. Because the joint request complies with our regulations and UP is willing to enter into these negotiations, we will issue a CITU as part of this decision.²¹

The parties may negotiate an agreement during the prescribed 180-day period, as discussed further below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, UP may fully abandon the Wallace Branch Line, subject to the environmental conditions and others terms and conditions set out below.²² Use of the right-of-way for trail purposes is subject to restoration for railroad purposes. See 49 CFR 1152.29(c)(1).

Other Trail Use Matters.

The Transcontinental Trails Association (TTA) and the Rails-to-Trails Conservancy (RTC) submitted a letter (on October 19, 1999, refiled April 18, 2000) supporting issuance of a CITU. They indicate that preserving this rail corridor will contribute to limiting the spread of toxic material, to fostering sound environmental conditions, and potentially to vast savings in taxpayer and private funds. They note that TTA had made a request to the ICC in 1992 for issuance of a CITU, to which UP assented, but that the ICC failed to issue the CITU. (TTA and RTC suggest that this was an administrative oversight by the ICC, that we should now correct.) They further note that RTC also requested a CITU in 1995, but that the Board denied that trail

²¹ No one has requested that we impose a public use condition under 49 U.S.C. 10905 in this case.

²² EPA noted in its comments to the Draft Supplemental EA that if there is no interim trail use agreement then it would reassess whether alternative salvage actions would still protect human health given possible different land uses and exposure patterns. Our environmental condition No. 1 requires UP to comply with any modifications and refinements that are made to the EE/CA documents prior to the time track salvage is completed.

use request as premature, by decision served November 15, 1996. TTA and RTC imply that they have been treated differently than the State and the Tribe with regard to requesting a CITU because, in our decision served August 12, 1999, setting up the process for completion of this case, we determined that the State and the Tribe did not have to refile their August 3, 1999 joint request for a CITU, while requiring any other potential trail sponsors to file trail use requests by September 7, 1999.

These arguments lack merit. The ICC did not issue a CITU to TTA in 1992 because an OFA for the Line had been filed by Hecla Mining Company (Hecla), and Hecla's offer was found to be bona fide. See 9 I.C.C.2d at 358-59. We properly denied RTC's 1995 request for issuance of a CITU as premature because of the court's remand of the ICC's salvage authorization in State of Idaho and the ICC's reopening of that portion of the case. See our decision served Nov. 15, 1996, slip op. at 4 ("When UP receives final approval to abandon the Line, we will expeditiously issue a CITU to RTC, TTA or any other eligible proponent of a trail, upon request, if UP agrees and the liability and rail banking requirements imposed by the statute and our rules are met.")

As noted above, UP has indicated its willingness to negotiate a trail use agreement with the State and the Tribe. UP has not, however, indicated a willingness to negotiate with TTA or RTC for interim trail use at this point. As the courts have found, interim trail use is voluntary and the railroad is under no obligation to negotiate concerning, or enter into, a trail use agreement with a particular potential trail sponsor. See, e.g., National Wildlife Fed'n v. ICC, 850 F.2d 694, 696 (D.C. Cir. 1988). Inasmuch as we have no authority to issue a CITU absent the rail carrier's acquiescence -- and UP has agreed to negotiate for trail use only with the State and the Tribe -- we cannot issue a CITU permitting Trails Act negotiations with TTA or RTC.²³

SUMMARY

In summary, as directed by the court in State of Idaho, the Board has now completed its analysis of the environmental impacts of going forward with salvage activities, and how to mitigate the potential impacts of track salvage. We have thoroughly reviewed SEA's Supplemental EA and all of the environmental information submitted by UP, agencies and others with specialized expertise, and members of the general public. We concur in SEA's determination that the potential environmental effects of salvage have now been thoroughly assessed and believe that SEA's final environmental mitigation conditions provide appropriate safeguards to ensure that salvage of this line will not have significant adverse environmental impacts and that preparation of an EIS is not necessary here. Accordingly, we grant UP final

²³ Moreover, neither TTA nor RTC filed a request for a CITU by the September 7, 1999 date we had set.

approval for salvage of the Wallace Branch rail line, subject to the environmental conditions and other terms and conditions set forth below. In addition, we remove the ICC's environmental conditions and issue a CITU permitting interim trail use/rail banking on this right-of-way under the Trails Act.

The new environmental conditions are:

- (1) UP shall comply with the mitigation measures set forth in: (a) the Engineering Evaluation Cost Analysis (EE/CA) and related technical documents prepared by EPA in consultation with the State of Idaho and the Coeur d'Alene Tribe to address contamination on the Wallace Branch; and (b) the separate Track Salvage Work Plan prepared by UP in consultation with the agencies involved in the EE/CA, including any modifications and refinements that are made to these documents prior to the time track salvage is completed. UP's removal actions pursuant to the EE/CA materials and the Track Salvage Work Plan also shall be subject to appropriate oversight by EPA, the State of Idaho, and the Coeur d'Alene Tribe.
- (2) UP shall comply with the mitigation measures set forth in the Biological Assessment prepared by an independent contractor for SEA, EPA, and the United States Fish and Wildlife Service (USFWS) and approved by the USFWS, to reduce impacts to the bald eagle and to Ute-ladies tresses.
- (3) UP shall retain its interest in and take no steps to alter the historic integrity of the Chatcolet swing bridge until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.
- (4) UP shall, prior to engaging in any salvage activities on this line, provide at least 90 days' notice to the National Geodetic Survey to plan for the relocation of station markers on the Line. The National Geodetic Survey has identified 58 geodetic station markers that may be affected by UP's salvage proposal. These markers are listed in Appendix C-2 to the Draft Supplemental EA.

It is ordered:

1. The Union Pacific Railroad Company may salvage the Wallace Branch rail line, subject to the environmental conditions specified above and the other terms and conditions, including trail use, set out here.
2. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.
3. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.
4. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and certificate and request that it be vacated on a specified date.
5. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and certificate, interim trail use may be implemented. If no agreement is reached by that time, UP may fully abandon the Line.
6. An Offer of Financial Assistance (OFA) to acquire the Line under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by July 6, 2000. The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,000. See 49 CFR 1002.2(f)(25).
7. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**
8. Provided no OFA has been received, this decision and certificate will be effective on July 26, 2000. Any petition to stay or petition to reopen must be filed as provided at 49 CFR 1152.25(e).
9. Pursuant to 49 CFR 1152.29(e)(2), UP shall file a notice of consummation with the Board to signify that it has fully abandoned the Line. If consummation has not been effected by UP's filing of a notice of consummation by June 26, 2001, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or

regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

10. The environmental conditions imposed by the ICC are removed.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary